BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LELAND ALEXANDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,282
LELAND M. ALEXANDER & COMPANY	)	
Respondent	)	
AND	)	
	)	
GRANITE STATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and claimant both appeal from an Award entered by Administrative Law Judge Jon L. Frobish on January 23, 1997. The Appeals Board heard oral argument on June 25, 1997.

APPEARANCES

Michael L. Snider of Wichita, Kansas, appeared on behalf of the claimant. Kim R. Martens of Wichita, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD

The record consists of the following:

(1) The deposition of Leland Alexander dated July 15, 1996.
(2) The deposition of Lawrence Richard Blaty, M.D., dated October 2, 1996.
(3) The transcript of the Regular Hearing dated November 5, 1996.
(4) The deposition of James A. Dulaney dated November 7, 1996.
(5) The deposition of Duane A. Murphy, M.D., dated December 10, 1996.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award. In addition, the parties have stipulated to the introduction of certain W-2 forms and have stipulated that respondent has filed a valid election and is covered by the Kansas Workers Compensation Act.

ISSUES

The Administrative Law Judge awarded benefits based upon a 62 percent work disability. Respondent contends the Administrative Law Judge erred in his determination of the claimant's average weekly wage. Respondent asserts that if the wage is properly calculated, claimant's post injury average weekly wage was at least 90 percent of the preinjury average weekly wage. As a result, respondent contends the Award should be based upon functional impairment only. Respondent also contends that the functional impairment should be reduced by the amount of claimant's preexisting functional impairment. Finally, respondent asks the Appeals Board to include in its order a requirement that claimant notify respondent if and when he begins receiving retirement benefits.

Claimant contends he is entitled to a higher work disability. Claimant's argument is, again, based upon disagreement with the finding regarding average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be modified.

The Appeals Board finds that claimant's average weekly wage at the time of the accident was $798.27.

Claimant is a self-employed owner of a construction business. This claim presents the often difficult problem of determining the average weekly wage of self-employed individuals. The Administrative Law Judge found claimant's average weekly wage to be $1,719.52. He based this finding on claimant's income tax return for the year preceding the accident. That return shows a business income of $89,415 which, when divided by 52 weeks, yields the $1,719.52 average weekly wage found by the Administrative Law Judge.

Respondent contends that the wage should be based upon claimant's testimony that claimant paid himself $700 per week as a wage. Claimant's counsel does not directly challenge the average weekly wage finding by the Administrative Law Judge but argues that the percentage difference between the post- and preinjury wage is greater than that found by the Administrative Law Judge. Implicit in claimant's argument is a different method for determining the average weekly wage. Claimant relies on the testimony of James A. Dulaney, who had done accounting work for Leland Alexander. Mr. Dulaney calculated the percentage difference between the amount of the owner draws claimant paid himself for the year preceding the accident and the year following the accident. This method reflects a higher percentage difference in the pre- and postinjury wage but also reflects a significantly

lower preinjury average weekly wage than that found by the Administrative Law Judge. The Appeals Board agrees with the method proposed by claimant.

The evidence reflects that claimant withdrew for himself a total of $41,510 during the 12 months preceding the date of accident. The record also reflects that claimant did often pay himself $700 per week, but occasionally he paid himself more and occasionally less. The evidence also shows he did not necessarily pay himself weekly. The average weekly amount he paid himself during the one year preceding the date of accident, including all amounts which might be referred to as salary, bonus, or other compensation, amounted to $798.27 per week. The Appeals Board finds the $798.27 to be the average weekly wage and considers this finding consistent with the principles stated in Justyna v. Logan Constr. Co., 10 Kan. App. 2d 249, 696 P.2d 977, *rev. denied* 237 Kan. 887 (1985) and Thompson v. Harold Thompson Trucking, 12 Kan. App. 2d 449, 748 P.2d 430 (1987), *rev. denied* 243 Kan. 782 (1988). In both cases, the Court of Appeals used the owner withdrawals as the basis for determining wage.

Respondent argues that the owner withdrawals can be used only when there is no evidence that claimant paid him or herself a specific amount as a wage. It is true that the facts discussed in those cases do not show circumstances precisely similar to those here where the claimant has testified he paid himself a set amount. The Appeals Board construes the cases, however, as indicating that the key factor is the amount claimant draws or otherwise goes for his personal use. In those cases, for example, the Court included amounts the company paid directly for food, clothing, or housing. The cases generally appear to support the proposition that the total amount claimant has paid to himself may be considered as wages.

As previously indicated, the Administrative Law Judge relied on the total amount of gross income shown in the income tax returns. The Appeals Board finds no indication that the appellate courts have rejected such a method. However, the method followed by the Administrative Law Judge introduces the system used by the Internal Revenue Service for determining what is or is not an appropriate business expense, depreciation, or credit. Use of the income tax return also often does not reflect the income for any particular period immediately preceding a date of accident when that date of accident is not the end of a calendar or fiscal year. Finally, use of owner withdrawals is a method directly approved by the appellate court decisions.

The Appeals Board further finds that claimant's post injury wage was less than 90 percent of his preinjury wage, and claimant is entitled to a work disability. Claimant is entitled to benefits for a work disability of 44 percent.

K.S.A. 1994 Supp. 44-510e(a) provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

As a result of his work-related accident on December 1, 1994, claimant injured his back, neck, head, and shoulders. Following the injury, Dr. Murphy recommended that claimant limit his activities to supervisory work such as interviewing and hiring employees, bookkeeping and banking. Dr. Blaty recommended more specific restrictions. In his report of March 13, 1996, he stated the restrictions as follows:

> "I would recommend he be limited to lifting, carrying, pushing, or pulling no more than 45 pounds occasionally or 20 pounds on a frequent basis. I would recommend he limit any overhead lifting to no more than 25 pounds occasionally or 10 pounds frequently and that he be limited to no more than occasional overhead reaching or overhead activities and avoid any repetitive or prolonged overhead activities. I would also recommend he be limited to occasional bending or twisting activities and avoid any prolonged weight bearing activities for greater than 3 hours at a time with the opportunity for positional changes as needed."

Claimant testified that his own production was down. He testified that when he could not find employees to do certain of the work, he turned some work down. He indicated this was reflected in his decreased income.

The records introduced through the deposition of James A. Dulaney reflect that the income was, in fact, reduced for the year following the accident. During that period, claimant earned $30,425, or 26.7 percent less than he had prior to the injury.

Respondent argues first that the postinjury wage was 90 percent or more of the preinjury wage. The argument is based in part on the contention that the preinjury wage was $700. For the reasons stated above, the Appeals Board has found the preinjury wage to be $798.27. Respondent's argument is also based in part on the contention that claimant is inappropriately manipulating the postinjury wage by increasing the amounts paid to his wife and reducing the amounts paid directly to himself. For the year preceding the accident, the records show a lump sum payment of $5,400 and an additional payment of $700 to claimant's wife. After the accident, claimant paid his wife $250 per week beginning July 27, 1995. Claimant acknowledged that the amounts he paid to his wife were deposited in a joint checking account.

Claimant testified that he had begun paying his wife an additional amount so she might be entitled to social security on the basis of her own income. Claimant's counsel offers to compare the total amount claimant paid himself and his wife during the year after the accident. The result is approximately 1 percent different from the comparison of the amounts paid to claimant only. The Appeals Board, nevertheless, considers it appropriate to use the amounts paid to claimant only. The record reflects that claimant's wife did work for the business. Nothing in the record suggests that the amount paid to his wife was excessive based upon the amount of work she did for the business. The Appeals Board, therefore, finds that the wage loss was 26.7 percent.

The testimony of Dr. Blaty provides the only evidence related to task loss. He testified to a 62 percent loss of ability to perform the tasks performed in the relevant 15-year work history. When the task loss and wage loss are averaged together, as required by K.S.A. 44-510e, the result is a 44 percent work disability which the Appeals Board finds to be the disability in this case.

The amount of the disability should be reduced by the amount of preexisting impairment. K.S.A. 1994 Supp. 44-501(c) provides:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Claimant sustained a back injury in October of 1973 while lifting sheetrock. He reinjured his back in December of 1973 and was eventually hospitalized. Claimant underwent a myelogram in which the results were negative or normal. Dr. Murphy, nevertheless, believed that claimant had a possible herniated nucleus pulposus at L4-5 and S-1 on the right. Dr. Murphy testified that, in his opinion, claimant had a 4 percent impairment of function which preexisted the injury at issue in this claim. Dr. Blaty testified that an unoperated herniated disc would be entitled to a rating of 7 to 8 percent based upon the AMA Guides to the Evaluation of Permanent Impairment. The Appeals Board finds that the award should be reduced by the 4 percent suggested by Dr. Murphy. Dr. Murphy's opinion was possible herniated disc. However, Dr. Blaty's 7 to 8 percent appears to be the assumption that claimant did, in fact, have a herniated disc. The record does not support that conclusion. The Appeals Board, therefore, concludes that the 44 percent work disability should be reduced by the preexisting 4 percent functional impairment and claimant should be entitled to benefits based upon a 40 percent work disability.

Respondent points to the provisions of K.S.A. 1994 Supp. 44-501(h) regarding retirement offset. Nothing in the record at this point would indicate claimant is receiving any retirement benefits. However, on January 3, 1997, claimant turned 65 and became eligible to receive social security benefits. The evidence indicates he has some money in an individual retirement account which he must begin drawing at age 70. Respondent asks that the award require claimant to inform the court and all parties when he does start to draw retirement benefits. The Board does not consider it appropriate to order claimant to engage

in specific future conduct. The Act provides an offset for certain retirement benefits under K.S.A. 1994 Supp. 44-501(h), and claimant should be aware of this fact as a result of these proceedings. The Act also provides penalties for concealing a material fact. K.S.A. 44-5,125.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Administrative Law Judge Jon L. Frobish, dated January 23, 1997, should be, and the same is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leland Alexander, and against the respondent, Leland M. Alexander & Company, and its insurance carrier, Granite State Insurance Company, for an accidental injury which occurred December 1, 1994, and based upon an average weekly wage of $798.27 for 12 weeks of temporary total disability compensation at the rate of $319 per week or $3,828.00, followed by 166 weeks at the rate of $319 per week or $52,954.00, for a 40% permanent partial work disability, making a total award of $56,782.00.

As of August 29, 1997, there is due and owing claimant 12 weeks of temporary total disability compensation at the rate of $319 per week or $3,828.00, followed by 131.14 weeks of permanent partial compensation at the rate of $319 per week in the sum of $41,833.66 for a total of $45,661.66, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $11,120.34 is to be paid for 34.86 weeks at the rate of $319 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Kim R. Martens, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director